Legality and the legal relation

Abstract: According to Immanuel Kant, legality means the quality of an action to be merely and simply in conformity with a law. The article defends the significance of this notion and explains how it indicates the existence of a legal relation. The legal relation, in turn, is the result of resolving an antinomy between the social and the substantive dimension of moral judgment.

Legality

The term "legality" can be used in at least two or three different ways. The best-known Anglo-American usage originates from Lon Fuller's reconstruction of the "inner" or "internal" morality of law. In his view, the precepts of this morality are addressed to people making it their business to "subject human conduct to the governance of rules". Fuller refers to these also as "principles of legality" (Fuller 1969, 197-198).[1] They erect some not quite determinate threshold that a standard or social practice has to meet in order to count as law. Apparently, Anglo-American positivists have whittled down this notion of "legality" to the point at which is means that some standard possesses "the quality of being law", a quality that is usually possessed by rules and decisions—in their view, regardless of whether they abide by the precepts of Fuller's internal morality.

[1] For a recent and most perceptive work on Fuller, see Rundle 2012. By contrast, American diehard Hartians, such as Coleman and Shapiro, have altered "legality" into a property that can be possessed by abstract entities. It is the property of being law. See Coleman 2001, 84; Shapiro 2011, 7. Legality means the quality of whatever belongs to the set of entities called "law". The major difference to Fuller's understanding is that the property "legality" would also extend to norms that fall short of the standards of the rule of law.

The term "legality", however, can also stand for what it has meant ever since Immanuel Kant introduced the notion to legal philosophy. In this understanding, "legality" designates the quality of an action to be merely and simply in conformity with law (Kant 1968, 325; Darwall 2006).[2] You act legally as long as you observe norms "externally" or "outwardly". That is to say that you act without endorsing as correct, or even obtaining direct guidance from, the norms that you happen not to transgress. The absence of endorsement is manifest in two forms of indifference, namely, on the one hand, in the irrelevance of the moral merit of laws for observance and, on the other, in allowing conduct to be actually motivated by *any* reason or attitude that is sufficient to give rise to conformity (to "obedience" in Hartian parlance). As is well known, Kant contrasts "legality", thus understood, with "morality" as the attitude that makes us observe moral standards out of a sense of duty or obligation.

In what follows, I would like to defend the relevance of the Kantian concept of legality. It is intriguing because it points to the nature of law *qua* particular relation among people. Actually, I

[2] It points to what you do *not* owe to an authority that regulates your conduct. You do not have to conform by having your conduct guided by the norm, let alone have it guided on the basis of your rational insight into its merits. Expressed in Razian parlance, this means that the law does not expect you to comply out of respect for the exclusionary reasons for action that constitute rules. Raz 2009, 144. The attitude towards law is not an issue. Even if one acted with the intention of doing something illegal one still acted legally if the conduct turned out not to be proscribed. Kantian legality goes beyond, but also extends to, the attitude of being *uninvolved* with regard to the purposes pursued by the law-giver. The legal subject is free to disregard the fact that the legal system may well be a system of plans. On this point, see Shapiro 2011. This attitude has been famously elaborated—and extended along the horizontal axis towards others—in Oakeshott's account of the rule of law and of the civic relation See Oakeshott 1999; Oakeshott 1975, 128-129.

would even go so far as to claim that "legality" is the symbol indicating the existence of a legal relation.

Hence, in the first – and longer – part of my lecture I would like to address the constitution of the legal relation and to explain how it belongs to the domain of practical reason. In order to explore this link I will dwell a bit on the perplexing phenomenon of reasonable disagreements. I hasten to add that I firmly believe that the topic is not as worn-out and tedious as it may appear and I also promise to spare you lengthy quotations from Rawls or Waldron.

In the second – and shorter – part, I would like to try to explain why constitutionalism and historicism are no accidental consequences of approaching law from such a relational perspective.

Two understandings of reasonable disagreement

I begin by exploring the question why it makes sense—from a moral perspective—that human beings construct a relation among themselves as a result of which the observance of what is called a "norm" does not have to go beyond, but may rather exhaust itself in, Kantian legality.

There are two ways of presenting the relevant case. While the point is the same, the perspective is slightly different. What I take to be the more continental way of stating it begins with an impasse of moral universalization (Somek 2017a; 2017b).[3] The alternative way is more congenial to Anglo-American political liberalism and begins with the experience of "reasonable disagreement" (Waldron 1999, 151). Since I am not confident that the continental manner of doing philosophy is fully appreciated outside of its cultural milieu,

[3] See, notably, Waldron 1999. Readers familiar with moral theory will immediately realize that the impasse of universalization and reasonable disagreement designate, at least in part, the same phenomenon.

I shall begin by observing the alternative path, which is by no means less interesting than the first.

Political liberalism – as we encounter it in Rawls' later works – is a way of doing legal philosophy that takes mutually shared experiences for granted. It does not begin, that is, with an alleged necessary truth, but with beliefs and views that are taken to be shared in societies at a particular moment of history. One such experience is that of reasonable disagreement, which, in turn, reflects the fact of ethical and religious pluralism as an enduring feature of liberal democracies.

It must not escape our attention that the identification of such a disagreement presupposes a mutually shared and defensible interpretation of what it is. This concerns, first and foremost, the qualifier "reasonable". Actually, experiencing a reasonable disagreement presupposes the validity of the claim that disagreements can be reasonable at all. Such a claim requires, however, some elaboration, of which I can only offer a brief sketch here.

The expression "reasonable disagreement" can designate at least two different phenomena.

The first is based on the realisation that it would be unreasonable to expect concord in certain situations. This is the meaning that we encounter, at least at first glance, in Rawls' *Political Liberalism* where he elaborates, albeit only tentatively, the burdens of judgment. Differences in upbringing, divergent interpretations of evidence or temperamental influences on the weighing of values explain, among other things, why people differ in their judgment (Rawls 1991, 56-57). Owing to the impact of these factors, it is reasonable to conclude that an agreement among people cannot be expected, at any rate, not normally. Even reasonable people—

people that are ostensibly neither partial nor fanatical and not incapacitated on the ground of ill health—are likely to disagree. A reasonable disagreement is an agreement that is to be expected due to the influence of limitations inherent in the exercise of reason and judgment.[4] What passes as reasonable it not the disagreement itself, but the realization that it won't go away even after rather extensive debates.

The second phenomenon is different. The reasonableness does not reside in the perhaps grudging acceptance *of* disagreement, but rather *in* the disagreement itself.

Again, it is helpful to clarify by means of a distinction what it might be that warrants the conclusion that a disagreement is a manifestation of reasonableness. Hence, I would like to distinguish two different views. While both of them can be traced back to John Stuart Mill's magisterial tract *On Liberty* (Mill 1991). I think it is fair to attribute only the first view to the author himself. The second comes to the fore in Mill's occasional emphasis on the spontaneity and vivacity of opinion, but this is a theme that may not have been a key element in his argument in favour of freedom of opinion and debate.

First, from the perspective of someone who, like Mill, fervently defends the intellectual benefits of debate and contestation, any disagreement is reasonable as long as its existence promises to advance further debate on the merits (Mill 1991, 41).[5] Even though

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[4] On the concept of judgment relevant to this discussion, see Menke 2011.

[5] That we must not interfere with such choices—for example, by grabbing their food and explaining to them that their preference is a consequence of bad judgment—is a consequence of the power that we ascribe to them to alter situations in a normatively significant way. Why people do what they do is immaterial thereto. What matters is that they do it. Judgment is transferred into a "choice".

Mill denies, not terribly convincingly, that a situation of disagreement is in his view to be preferred to one of agreement, it emerges clearly enough that he believes in the great intellectual virtue of having to defend one's own view against any opponent (Mill 1991, 61).[6] We can conclude, hence, that, from his perspective, any disagreement is reasonable as long as it promises to keep the participants in debates intellectually on their toes. Not by accident, Mill's fallibilism presents the determination of belief as a dialectical process that is best driven by the skills of an orator who is capable of proving himself in court (Mill 1991, 55, 57, 70)[7].

Alternatively, it is possible to attribute reasonableness to disagreement if its existence is necessary in order to make the universal appear in particular form. This would be, I add, tongue in cheek, something like the ontological proof of reasonable disagreement. It suggests that the work of reason, in order to be real, invariably involves that we, instead of agreeing, disagree.

Here is the core idea.

By believing and claiming to possess insight about the world we are literally self-effacing. If we believe to be right it does not matter, ideally, to us that it is *we* who know what we know. We believe our views to be correct, regardless of whether they are known and endorsed by us or virtually by someone else. The relevant knowledge could by anyone's.

But anyone cannot know anything. "Anyone" is not a knower; the term does not designate the first person plural, nor the first person singular. What is to be known can be known only by someone in particular. Someone has to be convinced of something.

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[7] Thinking that is alive is not reduced to an empty shall but actually informing human conduct. See ibid. 57, 70.

Hence, the effacement of the particular self that is presupposed for believing can only be attained by and within a or each particular self. With regard to this ineradicable particularity, Mill somewhat darkly refers to "individual spontaneity" (Mill 1991, 91)[8] as a way of being swayed by reasons that cannot be fully grasped by others and that makes people "use and interpret experience in [their] own way" (Mill 1991, 74). Not by accident, Mill also speaks of the necessity to encounter belief that is vivid. The relevant vivacity is evident in the vigour with which people stand up for what they deem to be right (Mill 1991, 55). We encounter real belief in real knowers. Convictions are involved in how real people make sense of this world and perceive their place within it. The strength of conviction reflects the seriousness with which human beings struggle to come to terms with their surroundings and doings. It is in this context, hence, that belief is actually alive and can be encountered in real controversy. Individuals are particulars, and the life of reason depends on this. Otherwise, we would never arrive at sound opinions but merely reproduce "dead dogmas".

I shall not attempt to discuss which account of reasonable disagreements is more plausible, even though I should confide in you that I find the second more intriguing than the first. What I wanted to remind you of is that reason, which is supposed to be one, has to embrace its own disunity in order to account for its reality (instead of what it ideally is). Any equation of reason with real consensus must be questionable, as a result.

With these observations in mind I should now like to turn to how we deal with reasonable disagreements in the moral domain.

Two dimensions of moral judgment

Can reason embrace disunity as its own principle?[9] In the moral domain, which is of relevance here, this is at least conceivable by taking two different dimensions of judgment into account. For the purpose of convenience they can be called the "social", on the one hand, and the "substantive", on the other.

The social dimension of judgment concerns the respect that is due to the judgment of others. Ideally, such respect is earned on the merits. We agree with someone on how to answer a question of morality because that person's answer strikes us as particularly articulate or elaborate.

The substantive dimension, by contrast, is precisely about the correctness of such an answer.

Usually, we take it for granted that respect of another's judgment, and agreement with it, ought to be derivative of its substantive merit. This reflects our belief in reason as one. In raising a moral claim we presuppose that everyone must agree with us. By the very act of claiming we posit that our view is more than just a view, namely also true or correct.

And yet moral respect for the particularity of individual judging persons (and the necessity of the disunity of reason) seems to require that we mutually recognise each other's substantive judgments. This may be taken to suggest that we mutually say to one another that we are "entitled to our opinions". Thus stated, however, the matter would be put too crudely, for it would fail to clarify whether or not embracing the particularity of practical reason is tantamount to endorsing a variety of moral relativism.

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[9] Such a reason would be, as James would have likely argued, imperfectly rational. See James 1975, 73.

Moral relativists believe that any justification of moral judgments depends on premises that are themselves not amenable to a justification. These premises may hence have to be postulated or simply be taken for granted as shared among the members of a group. As is well known, moral relativism amounts to a revocation of practical reason since it deprives it of its universality. But practical reason does not have to be swashed to pieces in the course of reconciling it with its other (disunity, that is). Relativism is the wrong conclusion to draw.

The path leading to the desired result consists of viewing oneself as one self among equal others. Looking at oneself in such manner implies disregarding the substantive dimension of moral judgment, which is the source of disagreement. The respect for one's own view must not flow from what each believes to ground it but from the fact that each is one judging person among others. More precisely, the substantive dimension or moral judgment, which is the carrier of practical belief, has to be reduced from "what" to "that". It is the "that" – the having of beliefs – that can be universalized along the social dimension by mutually paying respect to our views.

Practical reason realized

Paradoxically, practical reason can realize itself in the medium of disagreements by severing the respect that we owe to judgments – the social dimension – from even considering their correctness. This involves viewing ourselves as one judging person among others. What matters, then, when it comes to ascribing validity, is our equal status, and not what we believe to be right.

It is essential to realize that this move alters the shape of what we encounter in others. We no longer treat what others claim as potential expressions of insight but rather as their choice. People who from their first personal perspective believe to have reason to observe a vegan diet are regarded, from a second personal perspective, as people who choose to eat vegan food. What they want or do is rendered as a choice because by severing subjects from the reasons of their doings they not only seem to choose wantonly, they are themselves cast as detached from the substance of their choices.

The second-personal perspective, therefore, alters the first-personal relation. Once we integrate the second into the first, we do not have to go to great pains in order to lead an examined life. We are given the choice to pick and choose what we happen to want. The second-personal relation gives rise to the perplexing alternative between either being morally conscientious or detaching ourselves from our reasons for action. We are free to be negatively free from such reasons. As soon as we conceive of ourselves in this way we are beginning to experience the legal relation *foro interno*.

This demonstrates that we anticipate the legal relation on various occasions before it is fully developed in the context of a legal system. We enjoy taking a leave absence from the "voice of conscience" and smoke pot in a coffee shop in Amsterdam. What the heck! With regard to others, we do not attempt to refute claims that strike us as stupid simply because we want to show the person respect. We respect others or ourselves "as choosers" long before doing so is based upon legal rules. Everywhere in our dealings we are already on the move towards the legal relation in its full-blown form. In the latter case, once it has attained this form, rights and obligations – choices and the need to respect them – are based up-

on positive law adopted pursuant to constitutional procedures (see on page 14).

The bracketing of substance also implies universalizing the detachment from it. We become idealized into beings that are independent of their desires on the ground that they could have any. What is more, we are rendered as the choosers of or wants. Any choice is cast as a free choice since it does not matter whether it reflects the influence of mundane motives (Kant's "pathological determinants of choice"). Since, by contrast, our moral views concerning our own conduct and the conduct of others bespeak our particularity, the choosing human being as such is, not by accident, "abstract". It is rendered as a mannequin capable of having any want and bearing any right or duty. The "person in a legal sense" is the prototype of the various types that we encounter in legal reasoning, such as "buyer" and "seller".

It must seem as though the move from judgment to choice involved an inversion of the relation between the substantive and the social dimensions of judgment. Isn't respecting the substantive judgment, which is all of a sudden rendered as a "mere" choice, now derivative of the fact that another equal person has reached it?

But this is not the case. Something subtler is going on along the social dimension, namely the universalization of particularity. Choices and decisions are not an antithesis to practical reason but rather its continuation in the face of what accounts for its reality (Mill's "spontaneity"). It is also not the case that by accepting choices a potential or actual judgment is thereby taken to be sound, let alone convincing, simply on the ground that it is held by someone. Rather, in the guise of a choice, that which underpins a choice does not even amount to a moral claim. What underpins the choice

is transformed into a reason that is foreign, other than our own, and this marks the beginning of the hermeneutic experience.

Roughly speaking, the gestalt switch from judgment to choice raises the moral domain to a higher level. Morality can sustain itself in the face of disagreement by abstracting from substance and recognizing wanting. Morality can rescue itself through its own negation. And this implies, indeed, a continuation of practical reason that avoids moral relativism. It becomes possible to combine both joint action—yielding to others—and disagreement. We can move forward together by accepting choices and remain free to disapprove morally of any move that we make. Yes, it's that schizophrenic, but it is the schizophrenia we live by.

Authority and coercion

The relation of recognition among individuals is made possible by what Raz's would likely call content-independent reasons for action. The having of some reason by someone else to have us do or forbear from something is regarded as social fact to which each attributes normative significance.

> ▷ We must prune our tree because the neighbour has demanded that we do. ◁

> ▷ We must leave our flat because the landlady has terminated our lease. ◁

> ▷ We have to work longer hours because the boss has said so. ◁

The basic premise of practical reasoning is that rational insight is capable of directing action. Reasons for action can serve as our guides as long as we are amenable to such insight. When, by contrast, the substantive dimension of judgment drops out of the pic-

ture, reasons can longer dispose us to anything. Something else has to take their place.

This other factor is, above all, the respect that we owe to the mere choices of others. Remarkably, however, this respect may be legitimately given effect by acting—vis-à-vis the relevant substantive reasons of others—for any reason that moves us to do so.

The law does not require that we move out of an apartment after our lease has been terminated because we understand that the landlady has to avail of a dwelling for herself and her family. We may move out for the reason that we see no chance of succeeding with a legal challenge to her notice in a court of law or that we hated the place anyway and are indeed glad about being finally pushed out. Any reason that makes us move out of the place is as good as any other in order to pay respect to the choice of others, for none of these reasons is expected to reflect our approval of the substance of the decision from a moral point of view. No connection has to obtain between the reason of the right holder exercising her right and the reason of a person that is in that way obligated.

From this follows that the operative reason that makes us do what we are legally obligated to do may well even be coercive. Paying respect to the choices of others in the face of a threat of sanctions is consistent with the principle of legality according to which it does not matter what the reason is out of which people observe legal norms „externally".

I think I have come full circle. I believe to have reconstructed Kantian legality from the perspective of what it indicates, namely, the existence of a legal relation.

Now, why is this interesting?

Second-order reasonable disagreement

Three principles are implicit in the recognition of choices within the social dimension of moral judgment: freedom (qua autonomy), equality and reciprocity. These principles are manifest in the respect for autonomously determined judgments, the equality of judging persons and the reciprocal recognition of choices. They lay the normative foundation of the legal relation. Unsurprisingly, philosophers such as Kant and Fichte arrived at concepts of law that are about protecting freedom of choice subject to conditions laid down by universal laws.

Determining what such universal laws are requires taking another, and even harder, look at reasonable disagreements. By definition, they do not extend to disagreements that are unreasonable. Moral fanatics and those who ruthlessly assert their own interest at the expense of others do neither behave nor judge reasonably. People who deny others rights in virtue of some arbitrary factor do not strike us as reasonable. This demonstrates that the bracketing of substantial moral issues—the suspension or surrender of judgment—is carved out from within the space of the substantive dimension. Substantive moral beliefs set the limits for reasonable disagreement.

Drawing a line vis-à-vis unreasonable disagreements is of utmost importance for the realisation of the legal relation, for it is such a line that would designate the limit within which people may legitimately choose. That which cannot pass as a universal law cannot count as reasonable either. Arguably, thus, when it comes to identifying unreasonable disagreements we should expect the principle of universalization to serve as our reliable guide. Those ex-

empting themselves from the rules that they want to see applied to others are not to be admitted to an agreement to disagree.

Alas, unreasonableness often comes camouflaged in the guise of reason. Some may demand special treatment, for example, by pointing to their special needs. The problem must arise, therefore, that within any application of the universalization principle various factors must be given weight and that a determination has to be made with regard to what counts as a well-founded exception or a good reason to deny someone a benefit (to foreigners, for example). Hence, it turns out, immediately, that reasonable people are not unlikely to disagree over whether they are confronted with a reasonable disagreement or not.

Assuming that this is correct it follows that the scope of reasonable disagreements has to be determined from within reasonable disagreements concerning this scope. The experience of such second-order reasonable disagreement is the key to understanding why we have constitutions and not natural private law.

Any actual legal relation needs to be based on legal rules. The arguments on favour or against a rule invariably have to draw on substantive moral commitments. Within the scope of reasonable disagreements the contest over substantive questions becomes usually settled on the basis of a legislative choice. The power of the legislature is determined by the constitution. The constitution itself is also a choice, a choice made with an eye to what the people would regard as being outside the scope of reasonable disagreements.

The factual

But it seems that at some point choices have to come to an end. Not least in cases of constitutional interpretation it has to be

demonstrated what the constitution does not permit. In certain constitutional systems, courts have to divine where legislative choices can no longer pass as reasonable (all examples from German constitutional law): No hate speech, no playing at killing people, no downing of a hijacked aircraft with innocent passengers even if the plane is aimed at a crammed football stadium. Courts arrive at the relevant determinations thereby uneasily wavering between laying substantive arguments on the table, if there are any, and suggesting that "we" *de facto* see it that way.

Ultimately, the reasonable disagreement over the scope of reasonable disagreements can be settled only by a choice that claims to express the fact of agreement. But this, of course, inverts the moral domain. It makes it ancillary to the factual, that is, to the habituated moral reactions that Hegel conceivably would have called *Sittlichkeit*.

I conclude on a speculative note. This dependence of reason on the factual explains why there is an internal connection between the philosophy of law and the philosophy of history. Actually, the link is tighter than to moral theory. For there are two conceivable ways of accounting for *Sittlichkeit*: Either the self-determination of reason or the other of reason as reason's principle.

But the discussion of this question is a matter for another day.

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